No. 22297

United States Court of Appeals

For the Ninth Circuit

RALPH WILMOT, Counsel for the General Counsel for the National Labor Relations Board,

Appellant,

vs.

DAVID DOYLE, National Labor Relations Board Trial Examiner on relation of Local No. 959 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Independent Grocers Wholesale, Inc.,

Appellee,

RALPH WILMOT, in his individual capacity,

Intervenor.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

AT ANCHORAGE

HONORABLE JAMES A. VON DER HEYDT
DISTRICT JUDGE

BRIEF OF INTERVENOR

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STATEMENT RELATING TO JURISDICTION

Intervenor denies that the District Court had jurisdiction.

The jurisdiction of this court derives from Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Ralph Wilmot, as counsel for the General Counsel of the National Labor Relations Board, has appealed from the Order for Enforcement of Supoena Duces Tecum entered by the District Court on October 6, 1967 (R. 66, 67, 74, 75) and from the Order of the District Court finding him to be in contempt of court, orally announced on October 6, 1967 (R. 70), and formally entered October 9, 1967 (R. 71-72, 76), and, in his capacity as counsel for the General Counsel of the National Labor Relations Board, he is represented by counsel for that agency.

Because the order finding him in contempt of court (R. 71-72) runs against him personally and imposes a fine on him as an individual, and might jeopardize his standing at the bar, this court has accorded Mr. Wilmot the right to intervene in his individual capacity.

Mr. Wilmot is a lawyer, a member of the bar of the State of Washington, and at all times hereinafter mentioned was, and at present is, employed as a field attorney by the General Counsel of the National Labor Relations Board, assigned to the office of Region 19.

On April 17, 1967, the Regional Director of Region 19 issued a complaint in three unfair labor practice cases against Teamsters Local 959 and in one such case against Grocers Wholesale, Inc., an employer. These cases were consolidated and set for trial in Anchorage,

Alaska, on June 20, 1967 (R. 11).

Before the trial opened, counsel for the parties advised the trial examiner that settlement negotiations were pending and counsel succeeded in reaching a settlement agreement on June 21. By telephone Mr. Wilmot obtained oral approval of the settlement by the Regional Attorney in Seattle, the Regional Director, being temporarily absent. Accordingly the trial examiner left Anchorage without convening the hearing (R. 12).

On July 5, 1967, the Regional Director advised all parties that he would not approve the settlement agreement and would reschedule the hearing of the consolidated cases (R. 12).

The hearing was rescheduled for September 12, 1967. On September 6, 1967, while Mr. Wilmot was on vacation, Respondent Union served the subpoena duces tecum directed to Mr. Wilmot on whose behalf the Regional Director accepted service. The hearing was postponed to October 4, 1967 (R. 30).

On September 28, 1967, counsel for Respondent Union, Mr. Richard P. Donaldson, talked with Mr. Wilmot on the telephone about the subpoena, and it was agreed that Mr. Donaldson would not be required to serve a new subpoena (R. 30).

Under date of September 28, 1967, pursuant to section 102.118 of the Board's Rules and Regulations (29

CFR § 102.118), Mr. Donaldson addressed a letter to Arnold Ordman, General Counsel, requesting that he permit Mr. Wilmot to appear and testify in response to the subpoena and to produce the documents requested. The pertinent portions of the rule provide:

> "No . . . attorney . . . or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending . . . before the Board . . . with respect to any information, facts, or other matter coming to his knowledge in his official capacity . . . whether in answer to a . . . subpena duces tecum, or otherwise, without the written consent of . . . the general counsel if the official or document is subject to the supervision or control of the general counsel."

On September 29, 1967, Mr. Wilmot took the steps which section 102.118 imposes on him in the following language:

> "Whenever any . . . subpena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons . . . he will, unless otherwise expressly directed by the . . . general counsel . . . , move . . . to revoke . . . such subpena . . . on the ground that the evidence sought is privileged against disclosure by this rule: . . ."

Mr. Wilmot petitioned for revocation of the subpoena duces tecum (R. 30-31). His petiton was received by the trial examiner in San Francisco on October 2, 1967 (R. 3).

By telegram received by Mr. Donaldson on October 3, 1967, Mr. Ordman denied Mr. Donaldson's request that Mr. Wilmot be permitted to testify and produce the requested documents (R. 16). The Regional Attorney in Seattle telephoned Mr. Wilmot in Anchorage and acquainted him with the contents of the telegram from Mr. Ordman to Mr. Donaldson, a copy of which had been sent to the regional office (R. 31-32).

On the morning of October 4, 1967, trial examiner David Doyle convened the hearing at 10:00 a.m. and proceeded to conduct a pre-trial conference on the record, in which Mr. Wilmot's motion to revoke the subpoena duces tecum was considered and denied (R. 25-51).

Thereupon Mr. Wilmot asked for time to request leave to take an appeal directly to the Board from the trial examiner's ruling (R. 53), as he could do with special permission of the Board pursuant to section 102.26 of the Rules and Regulations (29 CFR § 102.26).

The trial examiner said with respect to a direct appeal to the Board:

> ". . . it would seem to me that this is not a matter upon which the general counsel should have a right of interim appeal, . . ." R. 54.

Accordingly, the trial examiner had Mr. Donaldson call Mr. Wilmot as a witness and request production

of the documents named in the subpoena. Mr. Wilmot declined to produce them. The trial examiner directed Mr. Wilmot to comply with the subpoena duces tecum and Mr. Wilmot declined to do so on the ground that he lacked the permission required by section 102.118 of the Rules and Regulations (R. 56-58).

Respondents Union and Employer moved that the case be dismissed (R. 34-36), basing their motions on section 102.35(8) of the Board's Rules and Regulations and on analogy to remedies for refusal to make discovery under the Federal Rules of Civil Procedure (R. 59).

The trial examiner denied the motions to dismiss and granted an adjournment to allow the Respondents Union and Employer to seek enforcement of the subpoena duces tecum in the District Court (R. 60-62).

On October 5, 1967, the Respondents Union and Employer served on Mr. Wilmot a petition for enforcement of subpoena duces tecum, addressed to the District Court, and brought by the trial examiner on relation of the two respondents (R. 3-4).

Mr. Wilmot moved for a continuance to allow him to seek permission to appeal directly to the Board, in which motion he recited that the necessary steps to obtain permission for such an appeal were under way (R. 1-2).

The petition and the motion came on for hearing at

4:10 p.m. on October 5. The court heard argument on both and denied the motion for continuance and reserved ruling on the petition for enforcement until 10:30 a.m. on October 6 (R. 65), ordering that, in the meantime, no individual "involved" in the hearing before the Board was to leave the jurisdiction of the court (Tr. 19).

At 10:30 a.m. on October 6, the court announced its decision granting the petition for enforcement of subpoena duces tecum and ordered the unfair labor practice proceeding to reconvene at 11:00 a.m. (Tr. 20-21). This rapid sequence of events left Mr. Wilmot no time at all to communicate to his superiors the order of the court and ask for instructions in the light of it.

The trial examiner reconvened the hearing at 11:00 a.m. as the court had ordered. Mr. Wilmot was called as a witness and refused to testify or otherwise respond to the subpoena (R. 69).

Mr. Wilmot was then ordered to appear at 3:30 p.m. on that same day, October 6, to show cause why he should not be held in contempt of court (R. 68).

The court convened at 3:40 p.m. and the court held Mr. Wilmot in contempt of court, fined him three hundred dollars, stayed the fine until 3:00 p.m. Monday, October 9, 1967, to allow him time to appeal, and ordered that, if no appeal had been taken by that

time, the fine would have to be paid, each day of violation being considered a separate violation. In addition, the court forbade him to leave the jurisdiction until released by the court (Tr. 29-30, R. 70-72). Appeals were timely taken from both the order directing Mr. Wilmot to comply with the subpoena duces tecum (R. 74) and the order adjudging him in civil contempt (R. 76), and Mr. Wilmot was permitted to leave Alaska.

No further proceedings were held in the unfair labor practice cases.

SPECIFICATION OF ERRORS

1. The District Court erred in taking jurisdiction of the petition to enforce subpoena duces tecum and of the entire proceeding.

2. The District Court erred in granting the petition to enforce subpoena duces tecum (R. 66, Tr. 20-21).

3. The District Court erred in finding the intervenor to be guilty of civil contempt (R. 70-72, Tr. 29-30).

SUMMARY OF ARGUMENT

The District Court had no jurisdiction at all to enforce the subpoena on the petition of the trial examiner or private parties.

Jurisdiction of the District Court to enter the orders from which appeal has been taken must be found in section 11(1) and (2) of the National Labor Relations

Act, Title 29 U.S.C. § 161, or it does not exist at all. The statute confers no such jurisdiction. Federal district courts being courts of limited jurisdiction, there is no jurisdiction unless clearly conferred by Congress. Congress in the area here material having limited the jurisdiction of the district court to enforce a subpoena solely to jurisdiction to enforce it on petition of the Board, no jurisdiction exists on application of the trial examiner or private parties.

The National Labor Relations Board may withhold or exclude any evidence it chooses to withhold or exclude from its own proceedings at the risk of entering an unenforceable order. No court can order the Board to produce or admit particular evidence. If the Board improperly withholds or excludes evidence, the parties have an entirely adequate remedy in the statutory procedure for review of Board orders.

The subpoena duces tecum was not enforceable in any event because the documents it sought were documents the production of which cannot be compelled by subpoena duces tecum.

ARGUMENT

I

THE DISTRICT COURT NEVER ACQUIRED JURISDICTION OF THE PROCEEDINGS IT BEING A COURT OF LIMITED JURISDICTION, CONGRESS HAVING CONFERRED POWER TO ENFORCE SUBPOENAS ONLY ON PETITION OF THE BOARD ITSELF AND NOT OF ANY OTHER PERSONS

The point which Mr. Wilmot urged unsuccessfully

before the court on October 5, 1967, that the court lacked jurisdiction to grant the petition for enforcement of the subpoena duces tecum was well taken.

It has been held countless times that United States District Courts are courts of limited jurisdiction and have only such powers as Congress bestows on them. In *Kline v. Burke Construction Co.*, 260 U.S. 226 at 234, 43 S.Ct. 79, 67 L.Ed. 226, the Supreme Court said:

> ". . . Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America*, 4 Dall. 8, 10; *United States v. Hudson & Goodwin*, 7 Cranch, 32; *Sheldon v. Sill*, 8 How. 441, 448; *Stevenson v. Fain*, 195 U.S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . ."

The jurisdiction of the district court must be found, if at all, in section 11(1) and (2) of the National Labor Relations Act, 29 U.S.C.A. § 161(1) (2), which reads, insofar as pertinent, as follows:

> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon appli-

cation of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, *and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings*, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. . . .

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, *upon application by the Board* shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." (Emphasis supplied).

Unless the jurisdiction of the district court is found within these provisions of the National Labor Relations Act itself, it does not exist, since the provisions quoted from the National Labor Relations Act are part of the

system provided by Congress for the enforcement of that particular statute. We are concerned in this case with the enforcement procedures of the agency itself and, if subpoenas issued in the name of the Board are not enforceable within the statutory scheme for enforcing the Act, they certainly are not enforceable under any general legislation.

Under the statute the District Court has jurisdiction to enforce subpoenas on petition of the Board only and not otherwise. In the instant case neither the Board nor the General Counsel petitioned the court for enforcement. Accordingly, the District Court acquired no jurisdiction to enforce it.

Two cases indicate the correct disposition of this appeal.

In *Biazevich v. Becker* (D.C.,S.D.Cal.,C.D., 1958) 161 F.Supp. 261, the District Court did what the District Court should have done in the instant case and dismissed the complaint of a private party for enforcement of a subpoena duces tecum directed to regional officials which the trial examiner refused to quash. In that case after the officials took the stand and declined to testify the parties seeking to adduce their testimony, unlike their counterparts in the instant case, did, at least, request the General Counsel of the Board to initiate enforcement proceedings in the District Court. The General Counsel denied their request to initiate

enforcement proceedings. The parties seeking to adduce the testimony then sought enforcement in the District Court. The District Court held, as the District Court should have held in the instant case:

> "The complaint does not state a claim over which this Court has jurisdiction. The federal district courts are without jurisdiction to intervene during the course of an unfair labor practice proceeding before a trial examiner of the National Labor Relations Board, for the purpose of deciding questions raised in that proceeding. The exclusive procedure for judicial review of such questions is provided by the National Labor Relations Act itself. Sections 10(e) and (f) of the Act provide for full review by the Courts of Appeals, following a final Board decision, of all questions which may be presented during an unfair labor practice case, and plaintiffs herein are required by the Act to follow that procedure to obtain a judicial determination of the questions they seek to have reviewed by this action. . . .
>
> "Plaintiffs are not entitled by Section 11(2) of the Act to maintain this action. That Section permits district court enforcement of subpenas only upon suit of the Board, and not of a private party. If the Board declines to institute an *ex rel.* proceeding for the enforcement of a subpena issued at the request of a private party the propriety of this action can be reviewed under Sections 10(e) and (f) of the Act, as described in paragraph 1, above, and such action may not be made the basis for a private suit for injunction in the federal district court, . . ." p. 265.

The attempt in the instant case to circumvent the Board and the General Counsel by petitioning the court in the name of the trial examiner on behalf of private

parties could not legally invoke the jurisdiction of the District Court and it never acquired any.

To hold otherwise and enforce a subpoena which the Board is not asking the court to enforce, would be to take jurisdiction over the trial of unfair labor practice cases away from the Board to which Congress has committed it, subject to wholly adequate judicial review and to give the District Court supervisory jurisdiction over the Board's proceedings. The action of the District Court in this case in attempting to enforce the subpoena duces tecum was an "improvident exercise of judicial discretion," *Myers v. Bethlehem Corp.* (1937) 303 U.S. 41, 52, 58 S.Ct. 459, 82 L.Ed. 638.

In *General Engineering, Inc. v. NLRB* (CA-9, 1965) 341 F.2d 367, this court denied enforcement to an order of the Board where the Board had erroneously revoked subpoenas issued to three regional officers. This court pointed out the principles applicable to the instant case in these words:

> "Since, in this proceeding the Board occupies a position similar to that of a plaintiff in a civil action (see Mitchell v. Bass, 8 Cir., 252 F.2d 513, 517), *it may, for any reason which seems sufficient to it, decline to produce evidence in its possession.* But just as a plaintiff in a civil action could not obtain a judgment if it persisted in withholding evidence which the court determined should be produced, so the Board could not enter an enforceable order if it insists on withholding evidence which, under the rules of evidence in effect in federal district courts, is admissible," (Emphasis supplied) pp. 375-376.

In the court below mention was made of the Public Information Act, Public Law 90-23; 81 Stat. 54; Title 5 U.S.C. § 552; U.S.C. Congressional and Administrative News, 90th Cong. 1st Sess., p. 787, although no serious analysis was made by anyone of just what that Act provided (R. 22). The Public Information Act is, of course, wholly inapplicable to this proceeding, and, in any event, the Respondents Union and Employer did not proceed in accordance with subsection (3) of that Act to elicit the "identifiable records" they sought. The Public Information Act did not change the rule of the *General Engineering* case with respect to what the Board must produce.

No concept of fundamental fairness is offended by Congressional withholding from the courts of jurisdiction to enforce subpoenas except on petition of the Board (or the General Counsel) because, as this court observed in the last paragraph of the *General Engineering* case, the Board can refuse to produce anything it wants to withhold in its own proceedings, subject to the risk of entering an unenforceable order.

The cases cited to the District Court by the Respondents Union and Employer were all cases illustrating the point made by this court in the *General Engineering* case, *supra*, that if the Board erroneously excludes evidence as irrelevant, or, if it erroneously refuses to order the production of evidence which is relevant as a matter of law, the result is that the Board finds itself

with an unenforceable order, *NLRB v. Capitol Fish Company* (CA-5, 1961) 294 F.2d 868; *Harvey Aluminum v. NLRB* (CA-9, 1964) 335 F.2d 749; *NLRB v. Fishermen's Union* (CA-9, 1967) 374 F.2d 974. No case has been cited in which any court has ever enforced a subpoena issued by the National Labor Relations Board on petition of anyone other than the Board or the General Counsel.

In the instant case, the District Court interfered with the conduct of a case not pending in the District Court, as for an injunction, *Sperandeo v. Milk Drivers & Dairy Employees Local U. No. 537* (CA-10, 1964) 334 F.2d 381; but pending before the Board. Congress gave the Board control over its own proceedings subject to judicial review. The action of the District Court was without jurisdiction and void, and amounted to an attempt to deprive the agency of this statutory right of control over its own proceedings.

II

THE SUBPOENA DUCES TECUM WAS NOT ENFORCEABLE IN ANY EVENT

Relying heavily on *Sherry & Gordon, Inc.* (1953) 107 NLRB 113, the Union and the Employer, respondents in the unfair labor practice cases, alleged that the settlement agreement they had signed on June 21, 1967, was an effective settlement and disposed of the pending cases (R. 22-23, 47).

Sherry & Gordon is in no way in point. In that case, an individual filed charges against the union and an employer in May, 1952. A field examiner arranged an informal settlement based on reinstatement, payment to the alleged discriminatee and withdrawal of the charges. All the terms of the settlement were carried out, but for some reason, unbeknowst to the union and the employer, the Regional Director did not sign the withdrawal form. On March 18, 1953, apparently without warning, a complaint issued. Before the Board, the General Counsel argued for the first time that there had, indeed, been a settlement in May, 1952, but that certain conduct in September, 1952, breached the settlement. The trial examiner observed in footnote 5 on page 116 that he was convinced that the Regional Director had approved the settlement in May, 1952.

In the instant case, the settlement was an informal one, entered into on the eve of trial by counsel experienced in labor relations law (R. 12). It was executed in multiples so that each party carried away with him an agreement signed by the Union and the Employer (R. 19). All knew that the Regional Director had not approved the settlement in writing because he was not present in Anchorage (R. 12). Likewise, all knew that Mr. Wilmot himself had not signed as recommending the settlement (R. 42). Within two weeks the Regional Director advised the parties that the settlement would not be approved and explained why (R. 12). No one

was misled. The situation fell squarely within the case of *NLRB v. Campbell Soup Company et al.* (CA-9, 1967) 278 F.2d 259, cert. den., Oct. 16, 1967.

Since the settlement agreement had been executed in multiple, all copies were originals and counsel for both the Union and the Employer had originals which were just as good as Mr. Wilmot's. For that reason alone the subpoena duces tecum should have been revoked and Mr. Wilmot should not have been ordered to comply with it or held in contempt for his failure to do so, *U.S. v. Schine* (D.C.N.Y., 1954) 126 F.Supp. 464.

At the pre-trial conference convened by the trial examiner at the commencement of the hearing of the unfair labor practice cases on October 4, 1967, Mr. Wilmot offered to permit the parties to examine the copies of the settlement agreement then in his file to see whether or not they had been signed by the Regional Director, although he assured them they had not been signed by the Regional Director and, of course, the Regional Director had advised the parties in writing under date of July 5, 1967, that he would not sign the settlement agreements (R. 12, 14, 44).

The "statement" as to telephone calls sought in the second item on the subpoena was equally improper. A subpoena duces tecum can elicit documents and records in existence when the subpoena is served but it cannot compel a witness to compile a list or do any affirmative

act, 97 C.J.S., Witnesses, Section 25(e), page 382, *Traud v. U.S.* (D.C.App., 1965) 232 F.2d 43, 47. Unless Mr. Wilmot just happened to have a list of calls with the information sought noted thereon, and there has been no suggestion that he did, the second item afforded no basis for any enforcement proceedings.

In any event, an offer of proof would have raised the legal issue which the Respondent Union and Respondent Employer were seeking to raise and would have fully protected their legal position. No offer of proof was made.

CONCLUSION

The record before the trial examiner and the District Court shows an attempt to obstruct the trial of four consolidated unfair labor practice cases by the device of trying Ralph Wilmot instead, and this with the complicity of and at the urging of the trial examiner (R. 53, 55, 61-64).

The District Court was utterly without a vestige of jurisdiction to enforce the subpoena in the absence of a petition by the Board or the General Counsel that it be enforced.

The order of enforcement being void, and without jurisdiction, the order adjudging Mr. Wilmot in contempt of it is equally without effect and void, 17 C.J.S., Contempt, § 14, pp. 38-39; *Pueblo Trading Co. v. El Camino Irr. Dist.* (CA-9, 1948) 169 F.2d 312; *U.S. v.*

Thompson (CA-9, 1963) 319 F.2d 665. In the last cited case this court said:

> "We hold, therefore, that a mandate is void which is beyond the power and jurisdiction of the issuing court and that the court may not punish for its violation. Ex parte Rowland, 104 U.S. 604, 26 L.Ed. 861 (1881); In re Sawyer, 124 U.S. 200, 8 S.Ct. 482, 31 L.Ed. 402 (1888); Ex Parte Fisk, 113 U.S. 713, 5 S.Ct. 724, 28 L.Ed. 1117 (1885). Thus, the power and jurisdiction of the court to issue a subpoena may be raised for the first time in a proceeding to punish for contempt," p. 668.

Both orders should be vacated.

Respectfully submitted,

ALFRED J. SCHWEPPE

MARY ELLEN KRUG

Attorneys for Intervenor

CERTIFICATE

I certify that, in connection with the preparation of this brief. I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney